

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARC WILSON,	)
	) No. 549, 2005
Defendant Below,	)
Appellant,	) Court Below: Superior Court of
	) the State of Delaware in and
v.	) for New Castle County
	)
STATE OF DELAWARE	) Cr. ID No. 0305001676
	)
Plaintiff Below,	)
Appellee.	)

Submitted: March 1, 2006

Decided: May 9, 2006

Before **STEELE**, Chief Justice, **BERGER** and **JACOBS**, Justices.

***ORDER***

This 9<sup>th</sup> day of May 2006, it appears to the Court that:

(1) Marc Wilson, defendant-below, pleaded guilty to first degree reckless endangering for assaulting his wife, Patricia, and on January 30, 2004 a Superior Court judge sentenced Wilson to five years at Level V suspended after three years and six months with decreasing levels of supervision. Wilson filed a motion for postconviction relief pursuant to Rule 61 alleging, among other things, that “the [Superior] Court imposed an illegal sentence.”<sup>1</sup> The same judge that sentenced

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<sup>1</sup> *State v. Wilson*, 2005 WL 3006781 at \*1 (Del. Super. Ct. Nov. 8, 2005).

Wilson denied that motion.<sup>2</sup> Wilson now claims on appeal that the judge imposed an “illegal sentence” because the judge relied on factual assertions that were false, impermissible, and lacked minimum indicia of reliability. Because we conclude that Wilson’s claim is actually that the judge’s sentence was “imposed in an illegal manner”(or “illegally imposed”) and not an “illegal sentence,” his claim is time barred, and we must affirm.<sup>3</sup>

(2) On May 3, 2003, Marc Wilson assaulted his wife Patricia during an argument after Patricia told him she intended to file for divorce. Wilson, who is six feet tall and weighs 190 pounds, dragged his 125 pound wife into the kitchen, threw her to the floor and repeatedly struck her head against the floor while telling her that she was going to die, and that their children would be orphans. Wilson strangled Patricia until she lost consciousness and then he left the house. Patricia regained consciousness and went to a neighbor’s house to call the police. The police arrested Wilson later.

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<sup>2</sup> We will refer to the Superior Court judge who sentenced Wilson and decided his Rule 61 Motion as “judge.”

<sup>3</sup> We ignore Wilson’s use of the term “illegal sentence” and consider the true substance of his claim. *See e.g., Candlewood Timber Group, LLC v. Pan Am. Energy, LLC*, 859 A.2d 989, 996 (Del. 2004)(a court must make a "realistic assessment of the nature of the wrong alleged and the remedy available in order to determine whether a legal remedy is available and fully adequate.")(quoting *McMahon v. New Castle Associates*, 532 A.2d 601, 603 (Del. Ch. 1987)); *Zeneca, Inc. v. Monsanto Co.*, 1996 WL 104254 (Del. Ch. March 15, 1996)(a “Court must examine the pleadings to determine the true substance of the relief [a party] actually seeks, and will not be bound by the form of relief as described [by the party].”) (citing *McMahon*, 532 A.2d at 603).

(3) On July 13, 2003, a Grand Jury indicted Wilson for attempted murder, but the State ultimately proceeded against him on charges of reckless endangering, assault, and terroristic threatening. Wilson pleaded guilty to first degree reckless endangering<sup>4</sup> and the State dropped the remaining charges. On January 30, 2004, Wilson was sentenced. The State sought the maximum sentence, five years at Level V, but the judge sentenced Wilson to five years at Level V, suspended after three years and six months with decreasing levels of supervision.<sup>5</sup>

(4) On February 20, 2004, Wilson moved to modify his sentence under Superior Court Criminal Rule 35(b). The judge denied Wilson's Rule 35(b) motion on May 26, 2005. Wilson appealed the judge's denial of his Rule 35(b) motion but later withdrew his appeal. On August 23, 2005, Wilson moved under Superior Court Criminal Rule 61 for postconviction relief. In his Rule 61 motion Wilson claimed that: (1) the judge imposed an "illegal sentence;" (2) his previous counsel was ineffective; and (3) the United States Supreme Court's decision in

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<sup>4</sup> A person is guilty of reckless endangering in the first degree when the person engages in conduct which creates a substantial risk of death to another person. 11 *Del. C.* § 604 (2005).

<sup>5</sup> The statutory sentencing range for first degree reckless endangering, a Class E violent felony, is zero to five years at Level V. Delaware Sentencing Accountability Commission ("SENTAC") 2005 Benchbook at 45. The SENTAC guidelines provide for a fifteen month presumptive sentence for reckless endangering in the first degree. The judge identified two aggravating factors justifying an upward departure from the fifteen month presumptive sentence of the SENTAC guidelines for this offense: (1) the vulnerability of the victim; and (2) undue depreciation of the cruelty of the offense.

*Blakely v. Washington*<sup>6</sup> prohibited the imposition of his sentence. The judge denied all three of Wilson's claims. On this appeal, Wilson has pursued the first claim only, that "the Superior Court imposed an illegal sentence," and thus, has abandoned the two other claims.<sup>7</sup>

(5) In reviewing the judge's denial of Wilson's postconviction Rule 61 motion, we first address the requirements of the Rule before reaching the merits of the claim.<sup>8</sup> Rule 61(a)(1) provides:

Nature of proceeding. -- This rule governs the procedure on an application by a person in custody or subject to future custody under a sentence of this court *seeking to set aside a judgment of conviction or a sentence of death* on the ground that the court lacked jurisdiction or on any other ground that is a sufficient factual and legal basis for a collateral *attack upon a criminal conviction or a capital sentence*. A proceeding under this rule shall be known as a postconviction proceeding.

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<sup>6</sup> 542 U.S. 296 (2004).

<sup>7</sup> *Somerville v. State*, 703 A.2d 629, 631 (Del. 1997) (claims not briefed on appeal are waived). It is important to note that Wilson's opening brief mentions *Blakely*; however, the discussion of *Blakely* was used to support Wilson's illegal sentence claim and does not support an independent *Blakely* claim. Additionally, we also note that Wilson merely mentioned the ineffective counsel claim in his reply brief. Mere recital of a claim in rebuttal does not preserve a right to advance that claim on appeal. *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993) (appellant waives claims not raised in his opening brief).

In any event, even if Wilson properly advanced the claims on appeal, we would affirm the judge's rulings on both of these issues. As the judge found, it is well settled that "*Blakely* does not impact Delaware's sentencing scheme because the SENTAC guidelines are voluntary and non-binding." *Benge v. State*, 2004 Del. WL 2743431 at \*1 (Del. Supr. Nov. 12, 2004). Moreover, if we were to reach the ineffective assistance of counsel claim, we would affirm on the basis of the judge's Opinion. *See Wilson*, 2005 WL 3006781 at \*2-3.

<sup>8</sup> *See Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

Clearly the rule provides a procedure for a criminal defendant to set aside a *conviction* or challenge a *capital sentence*. Here, Wilson did neither. Wilson assumed his conviction was proper and only challenged the imposition of a three year and six month prison sentence. Therefore, Wilson’s “illegal sentence” claim is not a cognizable Rule 61 claim.<sup>9</sup>

(6) Moreover, even if Wilson had advanced a substantive claim contemplated by Rule 61, Rule 61’s plain terms would bar his claim. “Rule 61(i)(3) bars from consideration any ground for relief that was not raised in the proceedings leading to the conviction unless the petitioner can establish: (i) cause for failing to timely raise the claim, and, (ii) actual prejudice from failing to raise the claim.”<sup>10</sup>

(7) Wilson failed to challenge his alleged “illegal sentence” on direct appeal. Wilson asserts that his ineffective counsel failed to raise his “illegal sentence” claim on direct appeal. Wilson’s cause or reason for failing to raise his claim timely lacks merit. Rule 61(i)(3) procedurally bars claims that could have been but were not raised below on direct appeal, even when ineffective assistance of counsel is asserted, unless the defendant successfully demonstrates that counsel

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<sup>9</sup> See *Childress v. State*, 741 A.2d 16 (Del. 1999)(“The narrow function of Rule 35(a) is to permit the correction of an illegal sentence [or a sentence imposed in an illegal manner]... Rule 61 governs the procedure upon which a person may attack a conviction.”).

<sup>10</sup> *McCluskey v. State*, 782 A.2d 265 (Del. 2001)(citing Del. Super. Ct. R. Crim. P. 61(i)(3)).

was in fact ineffective and that ineffectiveness prejudiced his rights.<sup>11</sup> Wilson failed to demonstrate that his counsel acted unreasonably by failing to file a direct appeal<sup>12</sup> if for no other reason than the fact his sentence was within the statutory limits and therefore not “illegal.”<sup>13</sup> Therefore, Rule 61(i)(3) procedurally bars his illegal sentence claim.

(8) The judge, recognizing that Wilson’s claim was not truly a Rule 61 claim, stated in her Opinion:

This claim is more properly raised under [Superior Court] Rule 35(a) because it seeks correction of an illegal sentence and not to set aside or collaterally attack the conviction... Nonetheless, Rule 35(a) permits correction of an illegal sentence ‘at any time’ so the Court will dispose of this claim in the context of the Defendant’s Rule 61 Motion.<sup>14</sup>

We understand this statement to mean that although Wilson’s claim was not truly a Rule 61 claim, the judge heard the claim anyway because Rule 35(a) allows the correction of an “illegal sentence” “at any time.” Put simply, the trial judge heard Wilson’s Rule 35(a) Motion “in the context of” his Rule 61 Motion in the interest

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<sup>11</sup> *Gattis v. State*, 697 A.2d 1174 (Del. 1997)(“Several of [the defendant’s] claims were not raised below or on direct appeal because, he alleges, the assistance of counsel was ineffective. Under Superior Court Criminal Rule 61(i)(3), such issues are procedurally barred from appellate review unless the defendant successfully demonstrates that counsel was ineffective and that counsel's ineffectiveness prejudiced his rights.”).

<sup>12</sup> *See Supra* note 6.

<sup>13</sup> *See Infra* p. 8.

<sup>14</sup> *Wilson*, 2005 WL 3006781 at \*1 n.5.

of judicial economy.<sup>15</sup> Therefore, we must also address whether Wilson’s “illegal sentence” claim under Rule 35(a) had merit.

(9) Rule 35(a) provides that “the court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence.” The time provided for the reduction of a sentence, absent extraordinary circumstances, is 90 days after the imposition of the sentence.<sup>16</sup> Therefore, the distinction between an illegal sentence as opposed to a sentence imposed in an illegal manner (or an illegally imposed sentence) is critical because a motion to correct an illegal sentence can be raised “at any time” while a motion to correct an illegally imposed sentence can only be raised, absent extraordinary circumstances,<sup>17</sup> “within 90 days after the sentence is imposed.”

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<sup>15</sup> We commend the judge’s effort to efficiently resolve this case. *See* DEL. JUD. COND. Canon 3 (A)(5)(“A judge should dispose promptly of the business of the court.”). Moreover, while the judge did not need to decide Wilson’s illegal sentence claim on the merits for reasons discussed in this ORDER, we recognize that the judge had to at least discuss this claim to resolve Wilson’s ineffective assistance of counsel claim. In part, Wilson claimed his counsel was ineffective because he failed to file a direct appeal challenging the alleged illegal sentence. Thus, the judge needed to at least discuss whether Wilson’s illegal sentence claim had any merit so she could determine if a reasonable attorney would have brought an appeal challenging the sentence. *Ayers v. State*, 802 A.2d 278, 281 (Del. 2002)(claims barred by Rule 61 were considered to the extent that the claims reflected on the defendant’s ineffective assistance of counsel claim).

<sup>16</sup> Del. Super. Ct. Crim. R. 35(b).

<sup>17</sup> Wilson does not claim that any “extraordinary circumstances” exist to justify the late filing.

(10) A sentence is illegal when the sentence imposed exceeds the statutorily authorized limits, violates the Double Jeopardy Clause, is ambiguous with respect to the time and manner in which it is to be served, is internally contradictory, omits a term required to be imposed by statute, is uncertain as to the substance of the sentence, or is a sentence which the judgment of conviction did not authorize.<sup>18</sup>

(11) Wilson asserts none of the above contentions. His claim that the judge relied on disputed facts when she exceeded the SENTAC guidelines clearly does not fit within the parameters of our case law that describes what constitutes an illegal sentence.<sup>19</sup> Rather, Wilson's claim is that the judge illegally imposed his sentence. Wilson was required to file his Rule 35(a) motion within 90 days of the imposition of his sentence.<sup>20</sup> Wilson filed his Rule 35(a) motion on August 23, 2004, almost 17 months from the date the judge sentenced him.<sup>21</sup> Thus, we need

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<sup>18</sup> *Brittingham v. State*, 705 A.2d 577, 578 (Del. 1998).

<sup>19</sup> *Fennell v. State*, 2005 WL 1950215 at \*1 (Del. Super. Ct. July 19, 2005)(discussing the distinction between an illegal sentence and an illegally imposed sentence).

<sup>20</sup> No extraordinary circumstances exist here that would remove the 90 day time requirement. Wilson claims the judge imposed an illegal sentence because she relied on disputed facts; this claim could have been brought by Wilson the day after he was sentenced. Put simply, no "extraordinary circumstances" exist nor has there been any assertion that any existed when Wilson filed his Rule 61 Motion.

<sup>21</sup> We determine that Wilson filed his Rule 35(a) motion on August 23, 2005, the date he filed his Rule 61 motion, because the judge ultimately considered Wilson's illegal sentence claim contained in his Rule 61 motion under Rule 35(a).

not address the merits of Wilson’s claim. We affirm the Superior Court’s judgment because Wilson makes no cognizable Rule 61 claim, and his claim that the judge “imposed an illegal sentence” is in fact a claim that the judge imposed his sentence illegally and comes too late under Rule 35(a).<sup>22</sup>

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

BY THE COURT:

/s/ Myron T. Steele  
Chief Justice

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<sup>22</sup> While the judge articulated a different rationale for her ruling in this case, we may affirm on grounds other than those relied upon by the judge. *Fennell*, 2005 WL 1950215 at \*1 (citing *Unitrin, Inc. v. American General Corp.*, 651 A.2d 1361 (Del. 1995)). Even if we were to reach the merits and decide Wilson’s claim that the judge relied on disputed facts to exceed the SENTAC guidelines, we would affirm. Wilson has provided nothing to indicate that his sentence was “imposed on the basis of demonstrably false information or information lacking a minimal indicium of reliability.” *Mayes v. State*, 604 A.2d 839, 843 (Del. 1992). Moreover, two uncontested and reliable facts: (1) Wilson had beaten and strangled his wife to unconsciousness while threatening to kill her, and, (2) she did, in fact, almost die in the assault, warranted a conclusion that “not deviating upward from the presumptive sentence would unduly depreciate the cruelty of this particular crime.” *State v. Wilson*, 2005 WL 3006781 at \*1. That finding alone justified a departure from the fifteen month presumptive sentence of the SENTAC guidelines.